

Supreme Court, U. S.

- FILED

No. 76-929

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

RUSSELL OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

DANIEL M. FRIEDMAN,
*Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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On September 12, 1973, petitioner filed a libel against the United States, pursuant to the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781-790, in the United States District Court for the Central District of California. He alleged that on October 26, 1971, he had been injured by negligent operation of a Navy tug (Pet. App. 2). Under Section 2 of the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 742, which is incorporated by reference into the Public Vessels Act (46 U.S.C. 782), the United States Attorney and the Attorney General must be served "forthwith" with the summons and complaint upon the filing of suit, and "[s]uits * * * may be brought only within two years after the cause of action arises * * *." 46 U.S.C. 745.

In this case, the United States Attorney was not served until November 8, 1973, and the Attorney General was not served until November 9, 1973—nearly two months after the filing of the libel and two weeks after the expiration of the two-year statute of limitations. On the government's motion for summary judgment, the district court dismissed the suit for failure to comply with the statutory service requirements (Pet. App. 2-4).

The court of appeals affirmed (Pet. App. 5-7). It agreed with the district court that "service effected 58 days after the filing of the complaint was not forthwith service under §742" (Pet. App. 7) and further held that "[w]hatever may be the rule where dilatory service occurs within the two-year statute of limitations, we hold that where service is not made forthwith and the delay extends beyond the period of limitations, it is proper for the district court to dismiss the action on motion of the government" (*ibid.*).

The applicable statute, 46 U.S.C. 742, is a limited waiver of sovereign immunity that must be strictly construed. Consequently, the failure to comply with the statutory condition that service be made "forthwith" on the United States Attorney and the Attorney General requires dismissal. *Battaglia v. United States*, 303 F. 2d 683 (C.A. 2), certiorari dismissed, 371 U.S. 907. *City of New York v. McAllister Bros., Inc.*, 278 F. 2d 708 (C.A. 2). Moreover, as the court of appeals recognized, the delay in this case resulted in service being effected after the two-year limitation period.

Petitioner contends that his failure to effect service "forthwith" was the fault of the United States Marshal's Office (Pet. 10). But while Rule 4(c), Fed.R.Civ.P., requires that "[s]ervice of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose," the governing

statute provides that "[t]he libelant shall forthwith serve a copy of his libel on the United States Attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing". 46 U.S.C. 742. It therefore was incumbent upon petitioner to see that service was promptly effected.

Moreover, since the statute provides that service upon the Attorney General shall be by registered mail, petitioner could have accomplished at least that service himself. See 4 Wright and Miller, *Federal Practice and Procedure*, §1092 (1969). As for personal service on the United States Attorney, petitioner could have applied, under Rule 4(c), for an order appointing a special process server. He failed to do either and permitted service to be delayed nearly two months, until after the expiration of the limitation period. In these circumstances, service was not "forthwith," and dismissal of the action was proper.

Finally, this case turns upon its unique and particular facts; it does not raise an issue of sufficiently general importance or applicability to warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

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